

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

PETER V. WAGNER,

Plaintiff,

v.

THE FISHING COMPANY OF ALASKA,
INC., *et al.*,

Defendants.

Case No. C06-1634RSL

ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION TO COMPEL DISCOVERY
RESPONSES

I. INTRODUCTION

This matter comes before the Court on "Plaintiff's Motion to Compel Discovery Responses" (Dkt. #45). After plaintiff filed his motion, defendant Solomon Kamson ("defendant") served responses to plaintiff's "First Interrogatories and Requests for Production," and as a result, the dispute over plaintiff's discovery requests has been substantially narrowed. See Response; Dkt. #52 (McIvor Decl.) at Ex. A. In his reply, plaintiff now seeks "meaningful answers to Interrogatories Nos. 5 and 6 and responsive documents to Requests for Production Nos. 4, 5, 7 and 23." See Reply at 3. Having reviewed the memoranda, declarations, and exhibits submitted by the parties, the Court finds as follows:

II. DISCUSSION

1. Plaintiff's Interrogatory No. 5 states: "Please specifically describe all symptoms you

1 noted in Mr. Wagner which demonstrated that an endoscopic decompressive microdiscectomy at
2 L2/L3 was medically indicated for Mr. Wagner as of August 1, 2006.” Dkt. #52, Ex. A.
3 Defendant answered: “Dr. Kamson’s examination, diagnosis and treatment of plaintiff Wagner
4 was the subject of testimony in Dr. Kamson’s deposition. Further, the entire patient record for
5 Dr. Kamson’s treatment of plaintiff Wagner was produced to counsel in October 2007.” Id.

6 Federal Rule of Civil Procedure 33 governs interrogatories, and requires that each
7 interrogatory “be answered separately and fully in writing under oath.” Fed. R. Civ. P. 33(b)(3).
8 Rule 33 provides only one exception where a party may refer to outside material in lieu of
9 answering the interrogatory:

10 Option to Produce Business Records. If the answer to an interrogatory may be
11 determined by examining, auditing, compiling, abstracting, or summarizing a
12 party’s business records (including electronically stored information), and if the
13 burden of deriving or ascertaining the answer will be substantially the same for
14 either party, the responding party may answer by:
15 (1) specifying the records that must be reviewed, in sufficient detail to enable the
16 interrogating party to locate and identify them as readily as the responding party
17 could; and
18 (2) giving the interrogating party a reasonable opportunity to examine and audit
19 the records and to make copies, compilations, abstracts, or summaries.

20 Fed. R. Civ. P. 33(d). This exception has been narrowly interpreted, however, and in
21 circumstances that do not strictly involve “business records,” federal courts have generally
22 refused to allow parties to answer interrogatories by referring to outside material. See Cont’l
23 Illinois Nat’l Bank & Trust Co. v. Caton, 136 F.R.D. 682, 687 (D. Kan. 1991) (stating that Rule
24 33(d) “applies to ‘business records’ from which raw data and facts can be discovered. The rule
25 does not mention deposition transcripts, documents or writings that were generated, or
26 discovered, respectively, during the course of prior discovery in the same case, only portions of
27 which may be relevant to the issues for trial.”) (emphasis in original); see also Scaife v. Boenne,
28 191 F.R.D. 590, 594 (N.D. Ind. 2000) (“It is well established that an answer to an interrogatory
must be responsive to the question. It should be complete in itself and should not refer to the
pleadings, or to depositions or other documents, or to other interrogatories, at least where such
references make it impossible to determine whether an adequate answer has been given without

1 an elaborate comparison of answers.”) (citation and quotation marks omitted); Starlight Int’l,
2 Inc. v. Herlihy, 186 F.R.D. 626, 640 (“A party may not properly answer an interrogatory by
3 referring generically to testimony given upon deposition. Incorporation by reference to a
4 deposition is not a responsive answer.”) (citation and quotation marks omitted).

5 Based on this persuasive authority, the Court finds that defendant’s response to
6 Interrogatory No. 5, which generically references his deposition testimony and plaintiff’s patient
7 record produced during the course of prior discovery in this case, is deficient. Accordingly,
8 defendant is ordered to supplement his response and produce the information requested by
9 Interrogatory No. 5 to plaintiff.

10 2. Plaintiff’s Interrogatory No. 6 asks defendant to “provide the date you first noted each
11 symptom listed in response to Interrogatory No. 5.” Dkt. #52, Ex. A. Defendant responded:
12 “Dr. Kamson’s examination, diagnosis and treatment of plaintiff Wagner was the subject of
13 testimony in Dr. Kamson’s deposition. Further, the entire patient record for Dr. Kamson’s
14 treatment of plaintiff Wagner was produced to counsel in October 2007.” Id. The Court finds
15 that this response is deficient for the same reason defendant’s response to Interrogatory No. 5 is
16 deficient. Accordingly, defendant is ordered to supplement his response and produce the
17 information requested by Interrogatory No. 6 to plaintiff.

18 3. Plaintiff’s Request for Production (“RFP”) No. 4 asks for “all documents that support,
19 relate to or corroborate your response to the preceding interrogatory [No. 5].” Dkt. #52, Ex. A.
20 In response, defendant stated: “See transcript of Dr. Kamson’s deposition, taken February 26,
21 2008; and Dr. Kamson’s patient record for his treatment of plaintiff Wagner.” Id. The Court
22 finds that given the nature of the document request, defendant sufficiently responded to RFP No.
23 4. However, if defendant’s supplemental response to Interrogatory No. 5 as ordered above
24 requires more than simply defendant’s patient record to “support, relate to or corroborate” the
25 supplemental response, defendant shall produce the additional responsive documents.

26 4. Plaintiff’s RFP No. 5 asks for “all documents that support, relate to or corroborate
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1 your response to the preceding interrogatory [No. 6].” Dkt. #52, Ex. A. In response, defendant
2 stated: “See Dr. Kamson’s patient record for his treatment of plaintiff Wagner, produced to
3 counsel in October 2007.” Id. The Court finds that given the nature of the document request,
4 defendant sufficiently responded to RFP No. 5. However, if defendant’s supplemental response
5 to Interrogatory No. 6 as ordered above requires more than simply defendant’s patient record to
6 “support, relate to or corroborate” the supplemental response, defendant shall produce the
7 additional responsive documents.

8 5. Plaintiff’s RFP No. 7 asks for “all documents that support, relate to or corroborate
9 your response to the preceding interrogatory [No. 8].” Dkt. #52, Ex. A. In response, defendant
10 stated: “See attached. This is a partial response, and it will be supplemented.” Id. The Court
11 finds that because defendant conceded this was an incomplete response, the Court orders
12 defendant to produce the additional responsive documents.

13 6. Plaintiff’s RFP No. 23 asks for “all documents that support, relate to or corroborate
14 your response to the preceding interrogatory [No. 25].” Dkt. #52, Ex. A. In response,
15 defendant stated: “Dr. Kamson will produce copies of any responsive documents located.” The
16 Court finds that this is an incomplete and evasive response because plaintiff does not know
17 whether any responsive documents exist, or whether defendant has just failed to search for the
18 documents. Accordingly, defendant is ordered to either produce the requested documents, or
19 state that no responsive documents have been discovered after conducting a diligent search to
20 locate them.

21 7. Having granted plaintiff’s motion to compel in part, the Court now must determine
22 whether to grant plaintiff’s request for attorney’s fees. See Reply at 3 (“Mr. Wagner requests
23 that the Court award Plaintiff attorney’s fees and costs incurred in drafting this motion[.]”).

24 Under Fed. R. Civ. P. 37(a)(5):

25 If the motion [for an order compelling disclosure or discovery] is granted—or if
26 the disclosure or requested discovery is provided after the motion was filed—the
27 court must, after giving an opportunity to be heard, require the party or deponent
whose conduct necessitated the motion, the party or attorney advising that

1 conduct, or both to pay the movant's reasonable expenses incurred in making the
2 motion, including attorney's fees.

3 In this case, given that the Court granted the majority of plaintiff's requested relief, and
4 the fact that defendant served his substantive responses to plaintiff's "First Interrogatories and
5 Requests for Production" after plaintiff filed his motion, the Court concludes that an award of
6 attorney's fees and costs is warranted.

7 **III. CONCLUSION**

8 For the reasons set forth above, the Court GRANTS IN PART AND DENIES IN PART
9 "Plaintiff's Motion to Compel Discovery Responses" (Dkt. #45). All responses required from
10 defendant under this Order shall be provided to plaintiff no later than 10 days from the date of
11 this Order. Based on the Court's conclusion above that an award of attorney's fees is
12 appropriate, plaintiff shall, within 10 days from the date of this order, submit an application for
13 fees and costs not to exceed 4 pages, excluding exhibits and declarations. Defendant may file an
14 opposition to this application, not to exceed 4 pages, excluding exhibits and declarations, within
15 10 days from the date of plaintiff's application. Both sides should refrain from personal attacks
16 in these pleadings. No other filings shall be permitted.

17 DATED this 18th day of July, 2008.

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20 Robert S. Lasnik
21 United States District Judge
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